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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 255

THE ELMHURST CEMETERY COMPANY OF JOLIET, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 16–18) is not reported. The opinion of the United States Circuit Court of Appeals (R. 38–40) is reported in 83 F. (2d) 4.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1936 (R. 41). On May 21,

1936, the court denied a petition for rehearing (R. 42). The petition for a writ of certiorari was filed August 3, 1936. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals properly reversed the Board of Tax Appeals for its failure to consider, in fixing the March 1, 1913, value of cemetery lots, that the average lot would not be sold for many years after that date.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 9–11.

STATEMENT

The petitioner about 1909 purchased 137 acres of land in or about Joliet, Illinois, which it has since owned and operated as a cemetery. The land cost $60,000. The north 37 acres of the tract were improved for sale as burial lots by landscaping, laying out roads, constructing pools, leveling, and planting trees, flowers, and shrubbery, at a cost of about $35,000 (R. 11–12, 17). From the acreage so improved sales of burial lots have since been made by the petitioner (R. 17).

During the period from 1908 to 1913 the number of square feet sold and the average selling price per square foot were (R. 17):

1909	7,308.55 sq. ft. at 73¢	per sq. ft.
1910	7,005.55 sq. ft. at 71.5¢	per sq. ft.
1911	7,312.20 sq. ft. at 70.2¢	per sq. ft.
1912	6,320.20 sq. ft. at 77.6¢	per sq. ft.
1913	8,506.10 sq. ft. at 79.5¢	per sq. ft.
Total	36,452.60 sq. ft. at 74.03¢	per sq. ft.

and during the month of March 1913, 312 square feet were sold at an average of 78.08¢ per square foot (R. 12). The average number of square feet sold per year, during these first years of the petitioner company's existence, was slightly over 7,000 square feet, and at March 1, 1913, the fair expectancy of sales of lots for the year 1913 was between 7,000 and 7,500 square feet (R. 14).

The taxable years under review are those of 1926, 1927, and 1928. During these years the number of square feet sold and the average selling price were (R. 17):

1926	14,939.9 sq. ft. at	$1.55
1927	10,979 sq. ft. at	1.66
1928	17,077.5 sq. ft. at	1.77

In reporting its income the petitioner used fair market value as of March 1, 1913, to determine its gain in the sale of burial lots in those years. To determine this value it chose the average selling price of lots for the one year period from March 1, 1912, to March 1, 1913, which was 76.6¢ per square foot (R. 15, 17–18).

The Commissioner of Internal Revenue determined the March 1, 1913, fair market value of the property to be 23.96¢ per square foot. The fair market value as of March 1, 1913, of the unsold land in the improved tract was placed at $79,458.55, which corresponded to a value of 13.7¢ per square foot. By adding to this amount the cost of improvements, amounting to 10.26¢ per square foot, the Commissioner determined the value of 23.96¢ per square foot for the improved land on March 1, 1913 (R. 6). The respondent's determination of value was made by discounting to the then present value in the light of the prospective time of sale of the property (R. 15). The only witness at the hearing before the Board of Tax Appeals was the superintendent of the petitioner; he estimated that it would take roughly 75 years from 1913 to sell the bulk of the lots in the improved area (R. 13, 19).

The Board of Tax Appeals held that the valuation used by the petitioner, the average selling price in the year prior to March 1, 1913, was reasonable and entered judgment for the petitioner (R. 18). The respondent filed a motion with the Board to make additional findings of fact and to modify its decision, which was denied (R. 19–22), and a motion to have the order denying this motion reviewed by the full Board, which was also denied (R. 23–27). On petition for review of the Board's decision the Circuit Court of Appeals for the Seventh Circuit reversed the decision of the Board

with direction to affirm the Commissioner's determination (R. 41).

ARGUMENT

1. The only question decided by the Circuit Court of Appeals was whether the time which would elapse before the property could be sold was an element which must be considered in finding fair market value on March 1, 1913. The Circuit Court of Appeals held, as a matter of law, that in the instant case the time element must be considered in determining fair market value so long in advance of the probable date of sale. It did not pass upon the weight of evidence,[1] but reversed the Board merely because it was in error, as a matter of law, in ignoring the time element and assuming that the sale price of a few lots measured the selling price of the entire tract on March 1, 1913. The result reached in this case by the Circuit Court of Appeals was similar to the result reached by this Court in *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, 149–152, where

[1] The court occasionally (R. 39–40) contrasts the cost price of $440 per acre in 1909 with the $32,000 per acre value fixed by the Board for the value on March 1, 1913. This discussion is not directed toward weighing the evidence but is either an illustration of the extraordinary result reached by ignoring the time element (R. 39) or is used to point the fact that evidence of value which ignores the distant date of sale is evidence so inadequate as to preclude the taxpayer from taking advantage of the statutory alternative of choosing cost or March 1, 1913, value, whichever is greater (R. 40).

it was held that there was error, as a matter of law, in failing to take certain known factors into consideration in arriving at the value of taxed property. Manifestly, therefore, the decision of the lower court is not in conflict with cases such as *McCaughn* v. *Real Estate Land Title & Trust Co.*, 297 U. S. 606, or *Helvering* v. *Rankin*, 295 U. S. 123, where the appellate courts improperly weighed the evidence.

2. The Circuit Court of Appeals did not predicate its decision upon the presumption of correctness attaching to the Commissioner's determination. It held merely that petitioner's evidence was insufficient in point of law either to show the correct value or to convict the Commissioner of error. Thus the lower court affirmed the determination of the Commissioner because it was uncontradicted by acceptable evidence and was based upon factors which were indispensable to the determination of value on March 1, 1913, and not merely because of the presumption attaching to it. *Del Vecchio* v. *Bowers*, 296 U. S. 280, deals with the weight to be given a presumption rebutted by evidence and *Helvering* v. *Taylor*, 293 U. S. 507, relates to a determination by the Commissioner which has been shown to be erroneous. Neither is in point.

3. The petitioner contends (Br. 11–16) that the reasoning of the Circuit Court of Appeals is unjust and fallacious. This objection is plainly misfounded so far as it relates to the decision that

there must be considered the long time which must elapse before the average lot would be sold. But it appears in largest part to be based upon objections to the Commissioner's calculations independent of his discounting the sale price to the present value as of March 1, 1913. The precise basis of the Commissioner's calculation was shown in an engineer's report to him which was excluded from the record on objection by the petitioner (R. 15). Petitioner made no effort before the Board to show that the discount method of valuation should have yielded a figure higher than the Commissioner's. The only question argued to or considered by the Circuit Court of Appeals was whether the time element should have entered into the determination of value. It is therefore not open to petitioner in this Court to argue that, accepting the time element as a proper consideration, the calculation was erroneous.

The petitioner alleges that the decision in the instant case is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Fairmount Cemetery Association* v. *Helvering,* 79 F. (2d) 163. In that case the court held that the time element, "the period of holding before a market can be had", should be considered in determining the fair market value of cemetery lands otherwise ready for sale. It sustained the Commissioner's valuation of the improved lots but disapproved his valuation of the unimproved land.

Since the time element in the instant case was considered only in regard to the improved land, the decision below is supported by the *Fairmount* case, in respect to the proposition that the time element must be taken into consideration in fixing the fair market value of cemetery property as of March 1, 1913. In no other respect is there any conflict, since that was the only question decided by the Circuit Court of Appeals in this case.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. There is neither conflict of authority nor an important question of law presented. It is therefore respectfully submitted that the petition should be denied.

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AUGUST 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 204. (b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property (or, in the case of such property as is described in paragraph (1), (4), or (5) of subdivision (a), the basis as therein provided), or (B) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

* * * * *

SEC. 1003. (a) The Circuit Courts of Appeals * * * shall have exclusive jurisdiction to review the decisions of the Board * * *; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.
(U. S. C., Title 26, Sec. 641.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

* * * * *

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913,

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Treasury Regulations 69:

ART. 1591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. * * * The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is—

(1) The cost of such property * * *, or

(2) The fair market value of such property as of March 1, 1913, whichever is greater.

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. * * * In the case of property traded in

on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

Treasury Regulations 74:

ART. 591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. * * * The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is (1) the cost of such property * * *; or (2) the fair market value of such property as of March 1, 1913; whichever is greater.

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. * * * In the case of property traded in on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

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